Date: December 2, 1997

Case Nos.: 96-ERA-41
97-CAA-6

In the matter of:

BOBBY W. WRIGHT,
Complainant,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

RECOMMENDED DECISION AND ORDER:

RESPONDENT'S MOTION FOR SUMMARY DECISION SHOULD BE GRANTED

This case arises under the employee protection provisions of several federal statutes: the Clean Air Act, 42 U.S.C. § 7622; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery act, 42 U.S.C. § 697l; the Safe Drinking Water Act, 42 U.S.C. § 300j - 9; the Water Pollution Control Act, 33 U.S.C. § 1367; the Comprehensive Environmental Response, Compensation and Liability act, 42 U.S.C. § 9610; the Toxic Substances Control Act, 15 U.S.C. § 2622; and the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851. The Complainant, Bobby W. Wright, filed his first complaint alleging retaliation and discrimination by his employer, Tennessee Valley Authority (TVA), on September 20, 1995. A second complaint, alleging additional acts of retaliation and discrimination against him as a result of his engaging in protected activity, was filed on October 29, 1996. Both complaints were investigated by the Administrator, Wage and Hour Division, U.S. Department of Labor, and in both cases, determinations favorable to the Complainant were issued. TVA timely requested hearings in each case. By Order of the Chief Administrative Law Judge, issued on April 2, 1997, the cases were consolidated for hearing and decision before me.

The Respondent, TVA, filed its Motion for Summary Decision, with supporting memorandum, 29 C.F.R. §§ 18.1(a), 18.40, 18.41 (1996), on April 2, 1997. The complainant's Response, in opposi-

tion to summary judgment, was filed on May 5, 1997. Further proceedings have been stayed pending this ruling.

The Complainant's Alleged Protected Activity

In his response to the Respondent's Motion to Dismiss, the Complainant succinctly summarizes his impression of what he alleges is protected activity which led to retaliation and discrimination again him, in violation of the employee protection provisions of the referenced environmental statutes:

> 1. The complainant's expressions of concern with regard to the handling of ground disks and the grounding of high voltage equipment at Respondent's coal-fired electric power-generating plant in Kingston, Tennessee, were protected activity under the employee protection provisions of the Acts cited by the complainant, because the improper use of ground disks and improper grounding of equipment can result in fires, boiler explosions, the shutdown of pollution control equipment, and contamination by the release of asbestos, PCBs, and other toxic substances.
>
> 2. The complainant's filing and pursuit of the original complaint in this case, resulting in findings in his favor by the Wage and Hour Division, was protected activity under the ... employee protection provisions.

Response, pp. 7, 17.

The Alleged Retaliation and Discrimination.

The adverse actions taken against the Complainant by the Respondent, TVA, allegedly for retaliatory and discriminatory reasons, are detailed in the Complaints:

> 1. On April 5, 1995, Wright received a written reprimand from Kenneth E. Lewis, Maintenance Superintendent at the Kingston facility, for his willful failure to timely complete an assignment, for leaving work early without permission on March 13, and for permitting electricians to swap shifts without obtaining approval of his supervisor, Brenda Byers. Each of the three allegations in the reprimand is disputed by the Complainant.
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> 2. The Complainant was suspended for three days, without pay, by Mr. Lewis on August 28, 1995, for

allowing employees to sign out at 12:30 p.m. when they had actually left the facility up to a half-hour earlier.

3. Also on August 28, 1995, the Complainant received his performance review for the previous 17 month period. For the first time in his TVA career his work performance was rated “unacceptable”.

4. In his next annual performance appraisal, received on September 24, 1996, the Complainant was given ratings of “marginal performance, improvement needed” on two occupational responsibilities.

5. At the performance review meeting with Ms. Byers and Mr. Lewis in September 1996, the Complainant was orally reprimanded for taking a leave day to conduct personal business without notifying his supervisor in advance. He was placed on leave control, being required to obtain prior approval of all future leave.

6. On October 3, 1996, the Complainant was relieved of his duties as a foreman and assigned to perform minor maintenance tasks under the special supervision of an individual in another department who is a machinist, not an electrician or electrical engineer.

7. The Complainant alleges that the adverse actions taken in September and October 1996 are all in retaliation for his protected activity under the environmental statutes and for having filed his first complaint on September 20, 1995.

Complaints, 1995, at pp. 3-5, and 1996, at pp. 6-8.

Relief Requested.

The Complainant asserts that retaliation and discrimination against him by TVA managers are likely to continue until he receives an Order of the Secretary of Labor requiring TVA managers to abate any and all violations. Moreover, the Complainant requests seven specific corrective actions:

1. Back pay with interest for work days missed as a result of harassment and intimidation.

2. Expungement of negative performance evaluations, the reprimand and the transfer and demotion, from

his personnel file and reinstatement to the former terms, conditions and privileges of his employment.

3. Instructions to TVA managers to give complainant only good recommendations.

4. Prohibit TVA from demoting, laying - off or terminating the Complainant in the future without good cause.

5. Compensatory damages for mental distress, pain and suffering, lost future earnings, and harassment, embarrassment and humiliation.

6. Punitive damages under provisions of the Safe Drinking Water Act and Toxic Substances Control Act.

7. Reimbursement of reasonable costs, expenses and attorney fees.

Complaint, 1996, at pg. 8.

The Grounds for Summary Decision.

The Respondent argues that the concern raised by the Complainant about the use of ground disks is not a protected activity under any of the cited environmental statutes, and that since the first complaint is not based on a reasonable perception of a violation of an environmental statute, it cannot form the basis for a subsequent claim of reprisal. Thus, there being no genuine issue of material fact to be decided, TVA claims entitlement to summary decision.

Summary Decision: The Legal Standards.

In her Recommended Decision and Order Granting Respondents' Motions to Dismiss and/or for Summary Decision in the case of Kesterson v. Y-12 Nuclear Weapons Plant, et al., ALJ Case No. 95-CAA-12 (ALJ Aug. 5, 1996), aff'd. ARB Case No. 96-173 (ARB April 8, 1997), Administrative Law Judge Edith Barnett concisely summarized the legal standards to be applied in deciding motions for summary decision for failure to state a claim on which relief can be granted in environmental whistleblower cases, relying on Varnadore v. Martin Marietta Energy Systems, Case Nos. 95-CAA-2, 94-CAA-3, 94-CAA-2, 93-CAA-1, 92-CAA-5 (ARB June 14, 1996) slip op., pp. 15-16 (hereafter, Varnadore):

Such motions are governed by 29 C.F.R. §§ 18.40 and 18.41. The ARB (Administrative Review Board) applies the standards set forth by he United States Supreme Court in the cases of Anderson v. Liberty Lobby, 477 U.S. 242 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) to motions for summary decision. A party opposing such a motion is not permitted to rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue of fact for the hearing. To defeat a properly supported motion for summary decision, the non-moving party must present affirmative evidence. If the non-movant fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, there is no genuine issue of material fact and the movant is entitled to summary decision.

The burdens of proof in environmental whistleblower cases are as follows. Complainants must prove, by a preponderance of the evidence, that they were retaliated against for engaging in protected activity. Such a showing requires proof that they engaged in protected activity; the employer knew about it; and the employer then took adverse action against them, which was motivated at least in part by the employee's protected activity. In dual motive cases, once the complainant has proven by a preponderance of the evidence that unlawful motive played a part in the employer's decision to take adverse action, the employer then has the burden of proving that it would have taken adverse action for legitimate reasons in any event. (Varnadore, slip op. at 31-32).

The standards for dismissal for failure to state a claim upon which relief can be granted are as follows. The facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the non-moving party. A dismissal is purely on the legal sufficiency of the complainant's

> case. Even if the complainant proved all of its allegations, (s)he could not prevail. In other words, even if the facts alleged are taken as true, no claim has been stated which would entitle the complainant to relief. (Varnadore, slip op. at 58-59).

Applying these standards, I conclude that summary decision is appropriate in this case and so recommend that the Respondent's Motion be granted.

Timeliness of Complaints.

The Complainant alleges discriminatory and retaliatory behavior by TVA managers towards him in violation of the Energy Reorganization Act (ERA) as well as employee protection provisions of several other environmental statutes. The limitations period within which a complaint must be filed under the ERA is 180 days from the date of the alleged adverse action, while under each of the other statutes it is only 30 days. 29 C.F.R. § 24.3(b) Remembering that the TVA facility at Kingston is not a nuclear-powered facility, whether the l80 day limitations period of the ERA can be relied on in this matter is open to question.

The Complainant alleges protection under the ERA based on five very flimsy, if not frivolous, relationships to the nuclear power industry:

1. Brenda Byers, an electrical engineer and the Complainant's supervisor, was employed as an engineer at TVA's Watts Bar Nuclear Plant prior to being transferred to Kingston in 1991.

2. Ms. Byers apparently qualified for a security clearance at Watts Bar.

3. Ms. Byers is a product of the "management culture" at TVA.

4. TVA's nuclear power programs, and the quality and integrity of its management and personnel, is subject to regulation by the Nuclear Regulatory Commission.

5. Ground disks are used in the same fashion at all TVA power-generating facilities, regardless of energy source.

Complaint, 1995, pg. 5. None of these threads of gossamer is sufficiently substantial to relate any of the Complainant's alleged protected activities to his having a concern about

nuclear safety. Complaints made about safety violations other than those related to nuclear safety are not protected under the ERA. DeCresci v. Lukens Steel Co., Case No. 87-ERA-13 (Sec'y. December l6, l993) It would be entirely unreasonable to find any connection to a possible violation of the ERA in the Complain ant's expression of safety concerns. Thus, the Complainant has no colorable claim under the ERA and cannot take advantage of its 180 day limitations period.

The applicable limitations period for filing these complaints, then, is the 30 day period provided in the other referenced environmental statutes and the Secretary's regulation, 29 C.F.R. § 24.3(b). A Complaint is considered to have been filed on the date of mailing. Relying on counsel's representations, the first Complaint was filed on September 20, 1995, and the second on October 29, 1996. Therefore, as to the first Complaint, any claims of allegedly adverse action, discrimination or retaliation that occurred before August 21, 1995, are time-barred; as to the second Complaint, any claims based on activity which occurred before September 29, 1996, are time-barred.

Therefore, the claim arising from the written reprimand which the Complainant received on April 5, 1995, from Kenneth E. Lewis, Maintenance Superintendent at the Kingston plant, predates the date of filing the first complaint by more than 30 days, no good cause which might allow tolling of the filing period has been shown, and so all claims arising from the April 5 reprimand must be dismissed as untimely.

The remaining claims, arising from alleged retaliation and discrimination against the Complainant, beginning with a three-day suspension levied on August 28, 1995, are timely.

Discussion

The appropriateness of summary judgment in environmental whistleblower cases such as this is now to be decided in light of the decisions in Kesterson, supra. Relying on prior decisions of the Secretary of Labor, the ARB stated that the environmental protection laws protect employees for making safety and health complaints grounded in conditions constituting reasonably perceived violations of the environmental laws, but do not protect an employee simply because he subjectively thinks the employer's conduct being complained about might affect the environment, and that internal complains about a technical issue which could only threaten the environment if many speculative events all occurred was not protected. The Complainant has the burden of proof to show the existence of a genuine issue for trial on each element of a prima facie case.

Protected Activity.

The Complainant argues that his expressions of concern regarding the handling of "ground disks" and the grounding of high-voltage equipment were protected activity because the improper use of ground disks and improper grounding of equipment can result in fires, boiler explosions, the shutdown of pollution control equipment, and contamination by the release of asbestos, PCBs and other toxic substances.

The complainant's concern in this regard was prompted by an incident in September 1992 at the Kingston facility which was precipitated by a contractor's improper grounding of high-voltage equipment in preparation for performing maintenance or repair work on it. The Complainant's recollection of that incident is recorded in a journal he maintained in 1995, apparently after he believed that TVA managers were taking adverse action against him:

> The results of this was some smoke and fire damage as well as tripping the board, losing # l stack and burning up the opacity boards. This caused considerable air pollution from # l stack as well as a danger of death of the people around the 4l60 volt board. Also cost TVA several thousand dollars in equipment damage .... I feel like, as well as several other people that this incident was covered up because of the air and environmental pollution.

(Complainant's Deposition, Exhibit 5). This is the only documented reference to perceived danger to the environment in the record. Soon after that incident occurred, TVA management restricted issuance of ground disks to TVA electricians. Later, the policy was revised to allow issuance of disks to TVA engineers also, a practice the Complainant disagrees with, but which is consistent with the practice at all other TVA facilities.

While failure to properly ground equipment can readily be seen as posing a threat to personal safety and to integrity of equipment and machinery, a threat to the environment is much more tenuous. Many events would have to occur to produce adverse environmental effects - (Complainant's Deposition, Tr. 25-28): improper grounding of equipment, attributable to improper use of ground disks and leads, must occur; sufficient voltage must remain on the equipment; excess voltage on the equipment must cause a spark to ignite a fire or must trip the main breaker to the plant; the fire must spread to the plant's boilers (the facility

has its own firefighters on site), and cause an explosion; asbestos must be released by the boiler explosion; if a voltage surge reached a breaker that controls pollution control equipment, the equipment would shut down; if transformers were involved in fire or explosion, PCBs could be released into the atmosphere from cooling oil. All of these events would have to occur to present a real risk of danger to the environment. That such a catastrophic series of events could occur and cause real environmental damage is wholly speculative.

The Complainant apparently believes that the incident in September 1992, which may have been precipitated by a contractor's improper grounding of a fan, resulted in some degree of pollution, although none is documented in the record. Assuming that he sincerely believes that TVA's policy regarding issuance and use of ground disks could lead to a threat to the environment, and recognizing that proof of an actual violation is not required, nevertheless Wright's "assumptions are both too numerous and too speculative for him reasonably to have perceived that [TVA] was about to violate one of the environmental acts". Crosby v. Hughes Aircraft Co., Case No. 85-TSC-2, Sec'y. Aug. 17, 1993, pg. 14. The Complainant's expressions of concern about the handling of ground disks and the grounding of electrical equipment at the Kingston power plant are not protected activity.

The sincerity of the Complainant's concern for potential environmental damage resulting from the allegedly improper handling and use of ground disks is certainly open to question. The Secretary of labor ruled in Aurich v. Consolidated Edison Co., Case No. 86-CAA-2, Sec'y. April 23, 1987 (Remand Order), that complaints related only to occupational safety and health, in contrast to safety and health of the general public, are cognizable under the Occupational Safety and Health Act, but not under the Clean Air Act (and presumably not under the other similar environmental protection statutes either). The Complainant's deposition testimony reveals concern for safety of workers and equipment, not for the environment or general public:

> Q. You said that the purpose of the clearance procedure was to protect personnel and equipment. Are there any other purposes?
>
> A. Not that I could really spell out at this time. Not to my knowledge, I can't think of any.
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> * * *
>
> Q. Are there any other purposes for the ground disks other than what you described?

A. Not that I can recall.

(Complainant's Deposition, Tr. 25, 26). Also, when the Complainant was asked what was the purpose of the ground disk itself, he responded, "well, it's for the equipment and the folks, too". (Tr. 26) When asked about the purpose of the disks on numerous occasions, he consistently answered that the purpose of the disks was to ensure safety of equipment and personnel. Later, he explained that there are occasions when even the high voltage equipment is not grounded while being worked on (Tr. 28).

The reasonable conclusion to be drawn from the Complainant's own testimony is that since ground disks seem to be used only when there is danger of a worker "getting into the connections", and not at all times, that the safety issue was strictly a personnel safety concern and may be an equipment damage concern, but was never an environmental concern.

The Complainant's description of the September 1992 incident does not reveal an environmental hazard:

> [T]he contractors plugged the ground into the hot bus [i.e. improperly grounding the fan]. Fortunately, we didn't have no big fire, but it smoked things up and did a lot of sparking and so forth. And after that happened, that's when the memo was issued to not issue the ground disks to the contractors.

(Complainant's Deposition, Tr. 22, 23). Later in his deposition, the Complainant was again questioned regarding his safety concerns about issuance of ground disks. On each occasion, he talked about people being issued disks when they were unfamiliar with the equipment and concern for the safety of people working on the equipment, but never articulated any concern about an environmental hazard related to improper use of the disks. His own explanation of his responsibilities as a supervisory electrician (Tr. 45, 46) makes crystal clear that knowledge of the equipment and the nature of the potential hazards to himself and his crew when working on that equipment, were paramount in his mind and that concern about the remote potential for environmental damage occurring if things went wrong was not present.

I discern no protected activity by the Complainant under the environmental statutes regarding the issuance and use of grounding disks.

Employer Knowledge of Protected Activity.

The above discussion reflects the Complainant's concern for the safety of himself and co-workers and to some extent, for damage to equipment. His discussions of the ground disk issues with management reflected those interests. TVA management could not reasonably have known that the Complainant had any thoughts about potential environmental hazards. This conclusion is supported by the following considerations: The disks are used only when the presence of workers on the equipment is possible; Mr. Wright's unwavering concern regarding his own safety and the safety of his crew; the lack of common traits between the past accident and the incident involving Ms. Byers; the lack of evidence regarding the severity of the past accident; the lack of evidence that TVA thought the concern expressed by Mr. Wright was anything but an Occupational Health and Safety issue; the lack of evidence showing anything but a speculative tie between the issuance of ground disks and an environmental danger; and no evidence causing a reasonable inference that a complaint on the ground disks could be considered a possible environmental threat without many speculative events occurring in between.

To survive a summary judgment motion the "non-movant must establish the existence of all essential elements of the prima facie case." Celotex v. Catrett, 477 U.S. at 322-23 (1986). Respondents' knowledge of the protected actions is an essential element. Morris v. The American Inspection Co., Case No. 92-ERA-5 (Sec'y Dec. 15, 1992) TVA management had no knowledge of the Complainant's alleged protected activity based on concern about hazards to the environment.

Employer's Motivation for Adverse Action.

Even if the Complainant has engaged in protected activity which the employer knows about, elements which are not established here, the Complainant still must prove, by a preponderance of the evidence, that the employer took adverse action against him which was motivated at least in party by the employee's protected activity. Kesterson, Case No. 95-CAA-12, ALJ Aug. 5, 1996, slip op. 8. For an employer's action to constitute an adverse action within the meaning of the environmental statutes, a "tangible job detriment" - something affecting a complainant's compensation, terms, conditions or privileges of employment - must occur. Id. at 13 Each of the actions which the Complainant alleges the employer took for retaliatory and discriminatory reasons, including the April 5, 1995, written reprimand as to which the complaint is untimely, is an adverse action within the meaning of the Acts.

However, to establish that the employer took adverse action at least in part because of the employee's protected activity,

there must be sufficient evidence in the record to warrant at least an inference that protected activity was the likely reason for the adverse action. Post v. Hensel Phelps Construction Co., Case No. 94-CAA-13 (ALJ Jan. 31, 1995). Because motives for actions are normally subjective, a connection may be shown by circumstantial evidence. Id. If disparate treatment of the Complainant is shown, the employer has the burden to articulate a legitimate reason, unrelated to the protected activity, that actually motivated the adverse action. Id.

Even if the complaint were timely as to the April 1995 reprimand, no retaliatory motive for the adverse action is demonstrated on the record. Wilful failure to timely complete a work assignment, leaving work early without permission, and permitting electricians to swap shifts without obtaining approval of his supervising engineer are all clear violations of TVA policies. TVA management was justified in issuing a reprimand.

The Complainant's August 28, 1995, suspension for authorizing his crew members to sign out at a time somewhat later than their actual departure time is also a violation of company rules, is fraudulent and is conduct which merits discipline. No evidence, circumstantial or otherwise, supports any connection between the employer's administration of discipline and Wright's complaints about the ground disks, even if it was protected activity known to the employer.

The Complainant's "unacceptable" rating in his August 28, 1995, performance review is based on his uncooperative attitude towards his supervisors, and particularly Ms. Byers. His deposition testimony clearly demonstrates his hostile attitude towards TVA management, and particularly towards Ms. Byers. Management's rating of the Complainant's performance was justified by his attitude and the tension he created between craft employees and supervisors.

While the filing of a complaint under the Acts is itself protected activity, Bryant v. EBASCO Services, Inc., Case No. 88-ERA-31 (Sec'y April 21, 1994), it can't be used to connect alleged protected activity occurring more than a year earlier to a new complaint filed in October 1996.

Adverse comments in the Complainant's annual performance review dated September 24, 1996, also reflect management's legitimate dissatisfaction with Wright's inability to cooperate with Ms. Byers and the tension and disruption generated by their relationship, having nothing whatever to do with allegedly protected activity. The Complainant's attitude just had not changed over

the course of the intervening year and still had not as of March 19, 1997, when he testified by deposition.

An oral reprimand for taking a day of leave without advance notice to his supervisor is also appropriate disciplinary action by supervisors, merited by his poor attitude and disruptive behavior, as is the imposition of the requirement that he obtain prior approval of leave in the future. The Complainant's constantly challenging Ms. Byers' authority and its adverse effect on the workplace environment needed to be corrected.

The Complainant's statements to management to the effect that putting Kenneth Lewis, Maintenance Superintendent, in charge of improvement of the electrical department was "like putting the fox in charge of the hen house," and that the only way to improve the electrical department was for Lewis and Byers to resign, were apparently the last straw for the plant manager who then was justified in relieving Wright of his duties as a foreman and transferring him to other work. Wright's attitude and repeated challenges to authority, not any conceivable protected activity, forced management to respond to an untenable situation by removing the Complainant from the scene. If anything, management showed restraint in allowing the Complainant's relationship with Byers to continue for some eighteen months before pulling him out of the unit. Management has the prerogative to make personnel decisions in the expectation that operations will improve as a result. The actions taken against Wright were appropriate. The filing of the Complaint under the Acts in September 1995 had nothing whatever to do with the adverse actions taken by TVA against Wright in September and October 1996.

Conclusion

I conclude that the Complainant's alleged environmental concerns regarding the issuance and use of ground disks involved no protected activity under the Acts; that even if the Complainant engaged in protected activity, no reasonable connection to environmental hazards was made known to TVA management; and that adverse actions taken by TVA management against Wright were justified for legitimate business reasons and were not in any way motivated by Complainant's illusory environmental concerns or by his filing a complaint under the enumerated environmental protection statutes.

There is no genuine issue of material fact to be resolved after a formal hearing.

Recommended Order

The Motion for Summary Decision filed by Respondent Tennessee Valley Authority should be granted.

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J. MICHAEL O'NEILL
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).